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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 30 1903
JAMES H. McKENNEY,
Clerk.

ANTON JOHANSON,
Plaintiff in Error.

vs. No. 282.

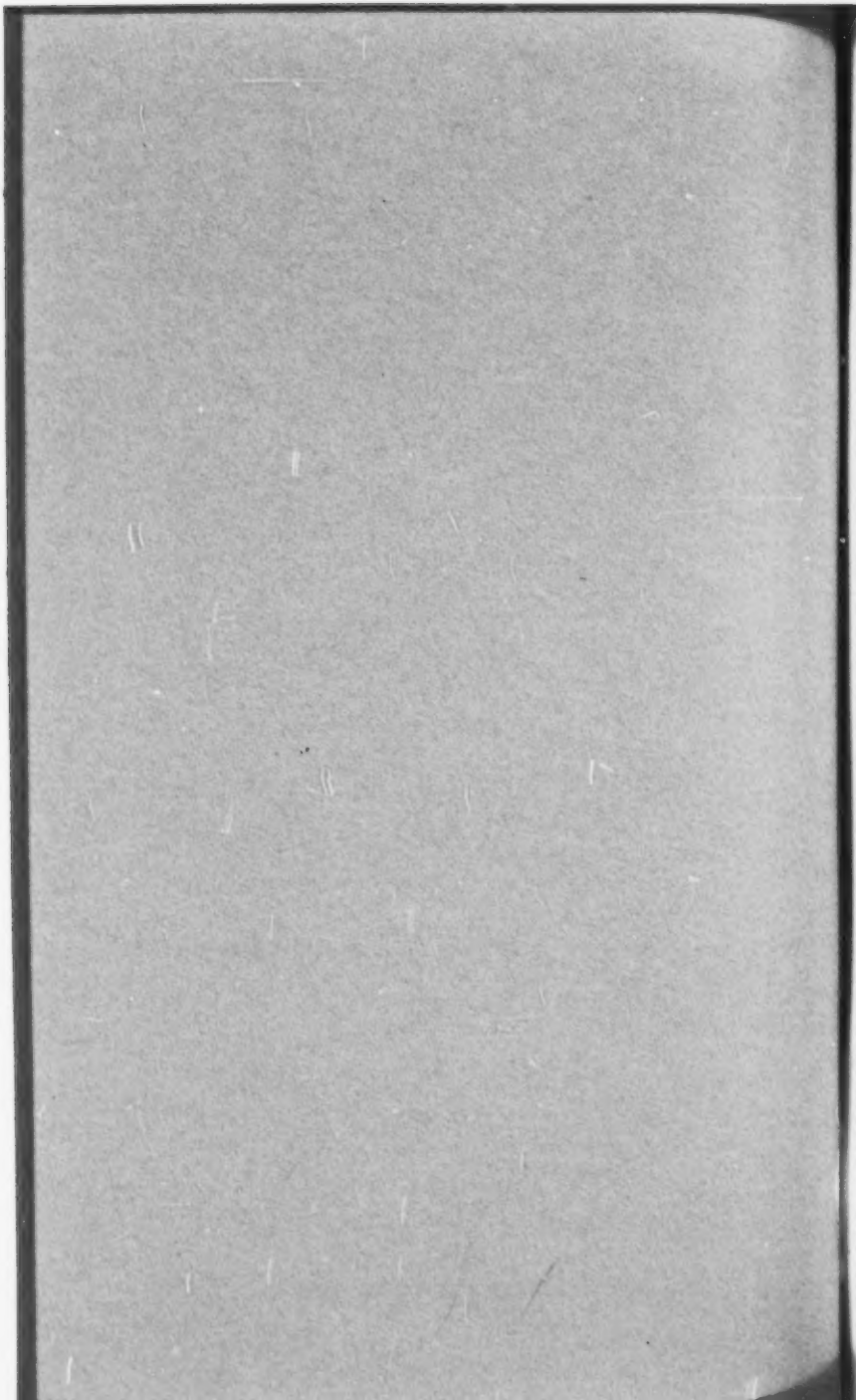
THE STATE OF WASHINGTON,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE DEFENDANT IN ERROR.

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.

The Metropolitan Press, Seattle.



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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

The first specification of error relied on by plaintiff in error (page 6 of his brief) to the effect that the state

supreme court erred in deciding that Phillip H. Lewis had authority to act as agent for King County in making the selection, is raised for the first time in this court. That this question was not suggested in either state courts is shown by the following statements of the plaintiff in error in his brief in the supreme court, towit:

"The first error was in holding the respondent had title to the land in controversy, and presents practically the only question in this case.

"The State's title consists of a selection made in Territorial days, under the Act of Congress passed March 2nd, 1853, (10 Stat. p. 179, Sec. 1947 R. S.), and the Act of February 26th, 1859 (11 Stat. p. 385, Sec. 2275 R. S.).

"Appellant contends that all the selection did was to set the land in question aside, or create a reservation of it for the purpose of granting it to the State, afterwards to be erected out of the Territory."

That the question of lack of authority of the agent was not intended to be raised but that Lewis' authority was conceded on all hands, is also shown by the very opening statement in the brief of respondent in the state supreme court, towit: "It is conceded that the land in controversy was selected by the county commissioners of King County *through a properly authorized agent.*" This statement was unchallenged in the reply brief of plaintiff in error. In fact it is expressly stated and found in the opinion of the state supreme court (p. 10, Transcript of

Record), that the land in controversy was duly selected by the county commissioners. This is the language used:

"Certain of these settlements were found to fall within sections 16 and 36, and the Government, *recognizing the settler's prior rights, patented the land to the settler.* In lieu of certain lands occupied and lost to the use of the common schools *in this way*, the *board of county commissioners, pursuant to authority expressly granted them by Congress, selected the lands in controversy.* This selection was, pursuant to the same authority, approved by the Secretary of the Interior."

To review the decision of the state court upon a question of fact is not within the jurisdiction of this court.

Dower v. Richards, 151 U. S. 658;
Bartlett v. Lockwood, 160 U. S. 357;
Egan v. Hart, 165 U. S. 188;
Hedrick v. Atchison &c., 167 U. S. 673.

A writ of error brings up matters of law only.

Dower v. Richards, supra.

In fact the first paragraph of the stipulated facts upon which the case was tried, shows that it was an admitted fact that the land in controversy was selected in full compliance with the acts of Congress of March 2, 1853, and February 26, 1859. (10 Stat. 179, Sec. 20, Sec. 1947 R. S. U. S.; 11 Stat. 385).

This stipulated fact is as follows:

"That the North half of the Southwest quarter, and the Northwest quarter of the Southeast quarter of Section 3, Township 25 North, Range 4 East, is of the value of $20,000, and was selected by Philip H. Lewis as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection, at the Land Office at Olympia, Washington Territory, May 24th, 1870, under an Act of Congress approved March 2nd, 1853, and an Act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872."

This stipulation just quoted shows that the selection made by Lewis "As agent for King County, Washington Territory," was approved by Secretary of Interior C. Delano, January 27, 1872. Such approval operated as a selection made by the executive department of the United States and therefore falls within the cases cited on page 7 of brief of plaintiff in error under the consideration of first specification of error. Such approval also operated as a selection by the proper executive department of the federal government under the act of February 26, 1859.

Todd v. Washington, 24 Land Decisions, 106;
Case of John W. Bailey, et al., 5 Land Dec. 216.

The second paragraph of the stipulated facts (Transcript of Record, p. 5) is as follows:

"March 13th, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior who on December 18th, 1895, decided adversely to Anton Johanson."

When the Secretary of the Interior, on December 18, 1895, decided adversely to Anton Johanson, he necessarily found and decided as a fact in the case that Lewis was the authorized agent for the purpose of making the selection. That being the case, under the rule announced by this court in the case of *Moore v. Robbins*, at page 535, of Vol. 96, United States Reports, "That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question," the authority of the agent cannot here be drawn in question.

This rule is of universal application and a further citation of authorities is unnecessary. The case of *Keene v. Brygger*, 3 Wash. at p. 348 et seq., reviews the authorities.

In the case of *Sharpstein v. State of Washington*, 13 Land Dec. 378, it was said:

"It appears that the county commissioners of King County, on February 8, 1870, appointed P. H. Lewis to select school indemnity land for the county. On May 24, of that year the agent filed in the local office list No. 2, embracing selections to compensate for deficiencies in nine townships, by reason of portions of sections 16 and 36 being under water."

It will thus appear that the department has found that Lewis was the duly authorized agent to make the selection in question (by said "list No. 2") and it has many times been decided by the Secretary of the Interior that the county commissioners might lawfully delegate that authority to an agent.

But this question of authority of agent not having been raised in the state court cannot be presented here for the first time.

Not only did the Secretary of the Interior in 1872 approve the selection made by King County through its agent Lewis as shown by the stipulation, but in the year 1895 the Secretary of the Interior also approved the same selection. This approval of 1895 related back to the time of the selection.

Keene v. Brygger, 3 Wash. 338, at p. 350.

April 23, 1895, the commissioner of the general land

office made the following certificate respecting the lands in controversy:

"Department of the Interior, General Land Office,
Washington, D. C., April 23, 1895.

"It is hereby certified that the tracts described in the foregoing list of school land indemnity selections are embraced in the original lists on file in the office of lands selected in the Seattle land district, State of Washington, *by a duly authorized agent of said State,* as indemnity for deficiencies in the sections and townships named, which school land indemnity selections are authorized by the acts of Congress approved March 2, 1853 (10 U. S. Stat., 172), February 26, 1859 (11 U. S. Stat., 385), and Sections 2275 and 2276 of the U. S. Revised Statutes.

"It is further certified that the lands reported lost or deficient and those selected in lieu thereof have been examined and compared with the township plats and tract books in this office; that the indemnity lands claimed have been found to be properly due the townships for which selected, and that the selected lands are shown to have been subject to selection; being surveyed agricultural lands, non-mineral in character and free from adverse claims.

"It is therefore recommended that the said list, embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37), be approved, subject to any valid interfering rights which may have existed at the date of selection.

"S. W. LAMOREUX,
"Commissioner."

And on May 24, 1895, Hoke Smith, the Secretary of the Interior, made the following approval:

"Department of the Interior, Office of the Secretary,
"Washington, D. C., May 24, 1895.

"The foregoing list of State of Washington school-land indemnity selections (No. 1), embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37) is hereby approved subject to any valid interfering rights which may have existed at the date of selection.

"HOKE SMITH, Secretary."

The certificate and approval just quoted attached to a description of the lands selected in list No. 2 by Mr. Lewis acting as agent, and of the lieu lands in question, are on file in the office of the land commissioner of the State of Washington, having been sent to that office by the Secretary of the Interior. It will be seen that very nearly six years after the Enabling Act had been passed the federal land department and the secretary thereof found that all the facts existed which were necessary to give to the state a title to this land in controversy. It is hardly possible that this title can be seriously questioned.

The acts of 1853 and 1859 have been construed by those whom the law specially appointed to construe and execute them. First, by Secretary Delano in 1872, and second, by Secretary Hoke Smith in 1895, "and it is a principle well recognized by the courts that the construction given to statutes by those charged with the duty of executing them should not be overruled without cogent reasons."

Keene v. Brygger, supra.

If a statute is ambiguous, contemporaneous and uniform executive construction is regarded as decisive.

Brown v. United States, 113 U. S. 568;
Edward's Lessee v. Darby, 12 Wheat., 210;
United States v. State Bank of N. C., 6 Peters, 29;
McSorley v. Hill, 2 Wash., 638.

Both approvals of the selection show that the secretaries construed both the act of 1853 and that of 1859 to be in force, and applicable to Washington Territory.

By the act of March 2, 1849, 9 Stat., p. 395, selections to be made by the Secretary of the Treasury under act of Congress approved May 20, 1826, 4 Stat., 179, were thereafter to be made by the Secretary of the Interior. Secretaries C. Delano and Hoke Smith both made such approval and selection as Secretary of the Interior.

The second specification of error seems to be based upon the theory that lieu lands under the act of 1859 could only be selected by an executive officer of the United States, viz., the Secretary of the Treasury; that the selection in controversy was not made by such officer; that therefore the selection made by the county commissioners was void.

As above suggested, the duty of making selections un-

der the act of February 26, 1859, supra, devolved upon the Secretary of the Interior. Act of March 3, 1849; 9 Stat., 395. *Todd v. State*, 24 Land Decisions, 106. The selection was so made, by the act of approval by Delano, Secretary of the Interior, in 1872.

It will be noticed the acts of 1853 and 1859 were alike in this; that under both, selections of lieu lands were allowed to supply deficiencies caused by settlement prior to survey. The stipulated facts show that the selections were made by Lewis as agent, etc., "under an act of Congress approved March 2, 1853, and an act of Congress approved February 26, 1859." The necessary conclusion from this stipulation is that the selection was made to compensate for deficiencies *caused by settlement* on school sections prior to survey, and not to compensate for deficiencies resulting from *natural causes*.

The selection was therefore properly made by the county commissioners.

It is submitted that there is nothing in the record to justify the statement found on page 7 of brief of plaintiff in error that the selection was made "because parts of sections 16 and 36 of that township were fractional in quantity, a portion of each being occupied by Lake Washington." The State Court of the State of Washington found that the selection in question was made to compensate for loss by reason of settlement on sections 16 and 36, as shown by the language used in its opinion (p. 10, Transcript of Record, *supra*).

It also seems plain that the act of 1859, as well as that of 1853, applied to Washington Territory. That is the view of the state supreme court; p. 8, Transcript of Record. Was it intended by the act of 1859, to give all other states and territories the right to lieu land to compensate for deficiencies by reason of natural causes, and to exclude the Territory of Washington from a like consideration? Both acts may be properly construed as applicable to Washington Territory; there is no necessary conflict between them. It is true that under the act of 1853 selections to compensate for deficiencies in school sections by reason of settlement thereon prior to survey are to be made by the county commissioners, and that under the act of 1859 the Secretary of the Interior may make such selections; but so far the acts are merely cumulative. If the county commissioners make such selections before the secretary does, that ends it. The secretary always knows what selections are made by the county commissioners because he must approve the selections, and the records in his office always show the school sections in lieu of which selections have been made by the county commissioners and there is therefore no danger of double selections.

Most if not all of the questions involved in this case have been passed upon and decided adversely to the contentions of plaintiff in error by the Secretary of the Interior. The acts of 1853 and of 1859 and the Enabling Act of February 22, 1889, (25 Stat. 676) admitting Washington Territory to statehood, have been construed in the

case of Levi Jerome, et al., reported in the 12 Decisions of the Department of the Interior, at page 165. After referring to the act of 1853 it was said: "This," (act of February 26, 1859; 11 Stat., 385) "was a general act, applying to all the states and territories, and by it the county commissioners of Washington Territory were authorized to locate lieu lands from additional bases." The same point was decided in the same way in the Wheeler case, decided by the department of the interior October 13, 1890, 11 Land Decisions, 381. From the case last cited it will also appear that it has never been considered that the Enabling Act of February 22, 1889, repealed the act of 1853 or that of 1859. The case of *Sharpstein v. State of Washington*, 13 Land Decisions, 378, as well as the case of *John W. Bailey et al.*, 5 Land Decisions, 216, holds that the act of February 26, 1859, is a general provision applicable alike to all states and territories, and authorizes the territory of Washington to select indemnity lands to cover deficiencies caused by the reserved sections being covered in part by permanent bodies of water, and that the land thus selected is not released from reservation by the act providing for the admission of said territory into the Union. Also that the authority conferred upon county commissioners in Washington Territory to locate school indemnity selections may be properly exerised through a duly authorized agent of said commissioners, whether such indemnity selections are made because of prior settlement on sections 16 and 36 or because of said sections being de-

ficient from any natural cause whatever. To same effect Smith's case, 11 Land Dec., 382.

We contend, therefore:

First. That lieu land selections under the act of 1859 might be made by the county commissioners or by their duly authorized agent.

Second. That in view of the act of 1849 creating the department of the interior, the selection of lieu lands under the act of 1859 might be made by the Secretary of the Interior and that his approval of selections made by a duly authorized agent of the county commissioners was in fact a selection by the Secretary of the Interior.

Third. That the act of 1859 applied to Washington Territory and that the selections were properly made thereunder.

The third specifications of error, namely, that the state supreme court erred in deciding that the State of Washington was on the 13th of March, 1893, seized in fee and possessed and entitled to the possession of the land in controversy is, the one most strongly relied upon by plaintiff in error and as we view the case is the only one upon which there can be any possible question.

It seems to be contended by plaintiff in error that inasmuch as the acts of 1853 and 1859 simply reserved this lieu land and as the same was not specifically granted by

the Enabling Act, the reserved land was again thrown open into the public domain and the state has no title. Plaintiff in error proceeds upon the theory that the state must recover on the strength of its own title and not upon the weakness of that of its adversary. We do not dispute this doctrine but under our statute plaintiff may recover either upon a legal or equitable title.

Secs. 5500 and 5508, Ballinger's Code. Opinion p. 7 Transcript.

It has never been the practice to patent to the state school lands or lands selected in lieu thereof. The title to lieu lands vests in the state by the selection and approval. 18 Land Dec. 493.

Even if the decision of the Utah territorial supreme court (United States v. Elliott, 12 Utah, p. 119), or the decision of the territorial supreme court of Washington (Barkley v. The United States, 3 Wash. Ter. 522) is correct, they are not in point because they were both rendered while Utah and Washington were still territories. They can hardly have any application to the case at bar for the reason that the Enabling Act of 1889 admitting Washington Territory as a state was in fact a grant to the state of the lands selected and reserved under the acts of Congress of 1853 and 1859.

The federal courts have decided that a reservation is in itself an appropriation for a trust purpose.

Trustees Vincennes v. Ind., 14 How., 273-4;
Wilcox v. Jackson, 13 Peters, 498.

The reservation and selection under the acts of 1853 and 1859 have the same force and effect as a grant.

Bailey Case, 5 Land Dec., 216, at p. 218.

Construing the acts of 1853, 1859 and the Enabling Act of 1889 together it is quite plain that these reserved lands were granted to the state.

The reservation made by the selection of the land in controversy while the territorial government existed continues until the selection is cancelled.

Wheeler Case, 11 Land Dec., 381, at p 382;
Smith's Case, 11 Id., 382.

The reservation made by said selection, has never been cancelled, but on the contrary, confirmed, and the land so reserved, granted, as appears by the act of Congress quoted below.

But whether that is true or not it seems to us that the act of Congress which became a law at the last session of the Fifty-seventh Congress just ended, places the principal question in this case beyond all controversy. It is not possible for us to refer to the statute containing this bill as the same has not yet been published, but a true copy of it is as follows:

"A BILL

"Relating to grants of land to the Territory and State of Washington for school purposes.

"Whereas by the Act of Congress of February twenty-second, eighteen hundred and eighty-nine, providing that the inhabitants of the Terrotory of Washington might, upon certain conditions prescribed in said Act, become the State of Washington, certain lands were granted to the said State for School purposes; and

"Whereas a doubt has arisen as to what lands were granted by section ten of said Act; and

"Whereas by section twenty of the Act of Congress of March second, eighteen hundred and fifty-three, entitled 'An act to establish the Territorial government of Washington,' the county commissioners of counties in said Territory were authorized to locate and select certain lands in lieu of sections sixteen and thirty-six occupied by actual settlers; and

"Whereas by the Act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, entitled 'An act to authorize settlers upon sixteenth and thirty-sixth sections who settled before the surveys of public lands to pre-empt their settlements,' certain lands were appropriated for school purposes in lieu of such as might be patented by pre-emptors, and to compensate deficiencies for school purposes where said sections sixteen and thirty-six were fractional in quantity or where one or both were wanting by reason of the township being fractional or from any natural cause whatever, and providing for their selection; and

"Whereas certain lieu lands have been selected by the Territory of Washington under said Acts of Congress; Therefore,

"Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled, That in all cases where sections sixteen and thirty-six or either or any of them or any portion thereof have been occupied by actual settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated have, under this Act of Congress of March second, eighteen hunderd and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within their respective counties in lieu of said sections so occupied as aforesaid, the lands so located or selected, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said Act of February twenty-second, eighteen hundred and eighty-nine, and said lands so selected and located are hereby granted to the said State of Washington and the title of said State thereto is hereby confirmed.

"Sec. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes where sections sixteen or thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause, whatever, or where section sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said Act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the lands so selected and appropriated, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington, by the said Act of February twenty-second, eighteen hundred and eighty-nine, and said lands so selected and appropriated are hereby granted to said State and the title thereto confirmed."

Under this law the lands in controversy selected were granted to the state by the Enabling Act in 1889. They have therefore been the property of the state ever since it was admitted into the Union and the state has ever since said time had the fee simple title. The court will not do a vain thing. If this case should be decided adversely to the state on the technical ground that the state had no title at the time the action was commenced, nevertheless under the act just quoted, the state could immediately bring suit against the plaintiff in error and eject him from the premises. The lands in controversy being reserved and not open for entry, the settlement of plaintff in error thereon is a mere trespass; and there is nothing to prevent the late Act of Congress from being given full force and effect.

Plaintiff in error contends that the effect of section 10 of the Washington Enabling Act and of the following portion of section 17 of the same act, "That the states provided for in this act shall not be entitled to any further or other grants for any purpose than as expressly provided in this act," was to restrict the grants for school purposes as provided by the acts of 1853 and 1859. The Levi Jerome Case, 12, Land Dec., 165, fully discusses this point. The above quoted section 17, the secretary says, "Relates more directly to the several grants made to the four states admitted into the Union in lieu of the provisions contained in the act of September 4, 1841 (5 Stat. 453) and of the act of September 28, 1850 (9 Stat. 519).

To construe the Washington Enabling Act as restricting lieu lands for school purposes, provided for in the act of 1859, would be to assume that Congress made less provision for the four new states than for the other states in the Union.

Under sections 10 and 11 of the Enabling Act sections 16 and 36, whether surveyed or *unsurveyed*, were granted to the state. Under the provisions of the acts of 1853 and 1859 those sections if settled upon while unsurveyed were subject to the claims of the settler. In this respect the act of 1889 differs from the preceding ones. It may also differ from them in other minor respects, but such difference can not have the effect to entirely repeal the former acts.

The State of Washington may have recognized its right to lieu lands under the terms of section 10 of the Enabling Act but so far as we are able to discover it has never done anything in recognition of the contention of the plaintiff in error that lands selected under the acts of 1853 and 1859 do not belong absolutely to the state in perpetual trust for the common schools.

Buckley Case, 4 Land Decisions, 390.

The concluding part of section 19 of the Washington Enabling Act is as follows:

"And there shall be deducted from the number of acres

of land donated by this act for specific objects to said states, the number of acres in each heretofore *donated* by Congress to said territories for similar objects."

Congress evidently looked upon the grant and reservation made by the organic act as in the nature of a donation, title to which had already passed and the clause just quoted was put in to protect the United States from having other selections made in addition to those already completed.

The reserved lands being held by the territory in perpetual trust for the common schools, could Congress pass any law that would effect the trust? See *State of Minnesota v. Batchelor,* 1 Wall, 109.

The court in the case of *Wilcox v. Jackson,* 13 Peters, at page 513, say:

"But we go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

The land in question having been donated and appropriated in perpetual trust for the common schools of the territory and of the states to be created therefrom, it was wholly unnecessary for the Enabling Act to make a specific grant of them.

The second subdivision of Art. 26, Constitution of Washington provides, "That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state * * *" It is not placing a strained construction upon this provision to say that it was an assertion of title to the land theretofore appropriated and reserved by the acts of 1853 and 1859 for the use of common schools.

Nor do we think that any of the acts of Congress or of the Territory of Washington with respect to Washington university lands show any construction whatever by Congress or Washington Territory of the acts of 1853 and 1859.

All of the property of the Territory of Washington passed to the new state, including the lieu lands selected and reserved. While it is true that the Enabling Act does not specifically grant these reserved lands, it is also true both Congress and the State in its constitution assumed that the lands reserved under the acts of 1853 and 1859 passed to the state by the Enabling Act and were included in the grant of sections 16 and 36.

In order to sustain the contention of plaintiff in error the court must hold that the federal government, more than fifty years ago, attempted to create a trust for the benefit of the school children then living or thereafter to live in Washington, which intent was never questioned for forty years, but by reason of a technical failure to use

certain direct language in the Enabling Act the court will refuse to enforce it.

It will also be remembered that the expense of making these selections and of maintaining them has been paid by the Territory and State of Washington. These facts ought to preclude the plaintiff in error from prevailing on the technical plea made against the existence of a trust. He is in no sense an innocent purchaser, but has had notice at all times.

A large amount of land was selected during territorial days under the acts of 1853 and 1859; the state has assumed to be the owner of all these lands so selected and has conveyed to innocent purchasers a large amount thereof. A decision adverse to the state would unsettle all of these titles which the citizens of the State of Washington have for the past ten years or more considered good. It is respectfully submitted that the decision of the supreme court of the State of Washington should be affirmed.

Respectfully submitted,

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.